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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-403

ROBERT L. KUNZIG, Administrator, General Services Administration, *et al.*,

Petitioners,

—v.—

JEANNE M. MURRAY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR JEANNE M. MURRAY

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BRIEF FOR RESPONDENT, JEANNE M. MURRAY

Opinions Below

The opinions of the court of appeals have been reported at 462 F.2d 871.

Question Presented

Whether a federal district court has jurisdiction to grant interlocutory relief pending an adjudication by the Civil Service Commission.

Supplementary Statement

At the close of business on Thursday, May 20, 1971, Mrs. Jeanne M. Murray was handed a letter stating that her employment as a probationary program analyst, GS-13, with the General Services Administration ("GSA") would be terminated the following Friday for failure to follow office procedures and to accept direction. Mrs. Murray had been given no prior notice, formal or informal, of any charges against her nor any opportunity to rebut them. Her job performance had been rated satisfactory the previous month. The letter continued, "You have no right of reply unless you feel this termination was based on discrimination because of race, color, religion, sex, national origin, political reasons, marital status or physical handicap."

The following Tuesday morning, Mrs. Murray's counsel met with Mr. Stan Maher of GSA Personnel to discuss her termination. They requested specifics on the charges against her and an opportunity to reply. Mr. Maher permitted them to see portions of a memorandum setting forth the basis for recommending her termination.

The memorandum contained adverse material about Mrs. Murray's conduct while employed at the Defense Intelligence Agency ("DIA"). Someone in GSA Personnel wrote that someone in DIA said that she had failed to follow office procedures there. Mrs. Murray was never informed of these charges and her record at DIA was in fact excellent.

That afternoon counsel sent a letter to Mr. Maher of GSA Personnel calling his attention to the Civil Service regulation which forbids the termination of a probationary employee "based in whole or in part" on prior conduct with-

out affording a hearing and bona fide consideration of the reply. 5 C.F.R. §315.805.

On the following Thursday afternoon, the GSA informed counsel that Mrs. Murray would not be given a hearing on her termination. Counsel immediately telephoned the Civil Service Commission to determine whether Mrs. Murray's appeal could be decided on an expedited basis in view of the impending termination date and was informed that the Commission's case load would not permit such a procedure.

After appealing to the Commission, Mrs. Murray brought suit in the District Court seeking an injunction to maintain the status quo, *pendente lite,* pending the Commission's decision. Judge Gasch granted a temporary restraining order and set the matter for hearing on a preliminary injunction a week later.

During the preliminary injunction hearing, the government offered in evidence an affidavit from the official who made the final decision to terminate Mrs. Murray. The affidavit stated that the DIA allegations had not entered into his decision in whole or in part. Since the proposed affidavit, when contrasted with the internal memorandum recommending Mrs. Murray's dismissal, raised a very serious question of fact, Judge Gasch determined that the proposed testimony should be given in person. The T.R.O. was then continued until the witness should appear and the hearing could proceed.

The government refused to produce its witness and appealed, alleging that the district court lacked jurisdiction to grant interlocutory relief pending a Civil Service determination and that the court could not require live testimony instead of the proffered affidavit.

The court of appeals affirmed on both points. The court noted that, while such relief should be granted only in "unusual circumstances," in the procedural posture of this case the government's position requires "a declaration of no jurisdiction in the District Court to grant temporary relief under any circumstance." The court refused to grant such a declaration.

The court also held that the district court's power to order live testimony was grounded in the express language of Rule 43(e), F.R.Civ.P. The government has apparently abandoned its contrary contention before this Court.

Reasons Respondent Does Not Object to Granting the Writ

The decision below is neither novel nor unwarranted. Rather, it represents the third reported case in which a fully established principle of equity jurisprudence—the jurisdiction of a court of equity to preserve the status quo pending an administrative decision—was applied in the area of a federal employee discharge. Moreover, experience with the district courts' administration of this principle in the ten months since the court's opinion conclusively refutes petitioner's claim that a flood of litigation has been unleashed.

For these reasons, respondent believes that the court of appeals' opinion was correct and should be affirmed. However, this is the first case of this nature to be presented to this Court. In view of the importance to millions of federal employees of the principle herein established, Respondent believes that this issue warrants the Court's attention and, accordingly, does not object to the writ's being granted.

1. The district court's orders grant relief only until the Civil Service Commission can decide Mrs. Murray's appeal to it.

Courts of equity have exercised the power to grant interlocutory relief maintaining the status quo pending an agency's decision since the inception of the modern administrative process. In early cases, involving determination of titles to land by an administrative agency, injunctions were uniformly issued to restrain waste pending agency decision.[1] With the continuing growth and development of administrative solutions to societal problems, injunctive relief has been granted at the instance of aggrieved individuals[2] and agencies themselves[3] in a variety of situations.

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[1] Olive Land & Development Co. v. Olmstead, 103 F. 563 (C. C. S.D. Cal. 1900); Northern Pacific Co. v. Soderburg, 86 F. 49 (C. C. N.D. Wash. 1898); Elliott v. Rich, 24 N.M. 52, 172 Pac. 194 (1918).

[2] Smith v. Resor, 416 F.2d 141 (2d Cir. 1969) [Induction of army reservist stayed pending military review proceedings]; Schwartz v. Covington, 341 F.2d 537 (9th Cir. 1965) [Soldier's discharge enjoined pending action by Discharge Review Board]; West India Fruit & Steamship Co. v. Seatrain Lines, Inc., 170 F.2d 775 (2d Cir. 1948) [Rate reduction enjoined pending decision by Maritime Commission]; Pennsylvania Motor Truck Ass'n v. Port of Philadelphia Marine Terminal Ass'n, 183 F. Supp. 910 (E.D. Pa. 1960) [Pier operators' truck loading practice enjoined pending decision by Maritime Board]; Reeber v. Rossell, 91 F. Supp. 108 (S.D.N.Y. 1950) [Discharge of federal employee enjoined pending review by Civil Service Commission]; Isbrandtsen Co. v. United States, 81 F. Supp. 544 (S.D.N.Y. 1949), appeal dismissed, 336 U.S. 941 [Implementation of rate agreements enjoined pending review by Maritime Commission]; see, Page Communications Engineers, Inc. v. Resor, No. 24,784, at pp. 1-2 (D.C. Cir. December 4, 1970) (Unreported) [District Court has power to enjoin performance of a contract pending GAO decision at the instance of an unsuccessful contractor]; see generally, Comment, Interim Injunctive Relief Pending Administrative Determination, 49 Colum. L. Rev. 1124 (1949); Note, Human Relations Commissions, 74 Yale L. J. 1171, 1199 n. 141 (1965); L. Jaffee, Judicial Control of Administrative Action, pp. 662-86 (1965).

[3] FTC v. Dean Foods Co., 383 U.S. 597 [Merger enjoined pending FTC decision]; Public Utilities Commission v. Capital Transit Co., 94 U.S. App. D.C. 140, 214 F.2d 242 (1954) [Rate increase enjoined pending decision by P.U.C.].

At least twice before, this principle has been invoked by the courts to stay the discharge of a federal employee. *Schwartz* v. *Covington*, 341 F.2d 537 (9th Cir. 1965); *Reeber* v. *Rossell*, 91 F. Supp. 108 (S.D.N.Y. 1950) (Kaufman, J.).

The relief is limited to those cases in which a party who is actively pursuing an administrative remedy and can show likelihood of success in that pursuit is in danger of being irreparably injured prior to administrative vindication. Where no attempt is made to exhaust the administrative remedy, the principle is, of course, inapplicable. *Ogden* v. *Department of Transportation*, 430 F.2d 660 (6th Cir. 1970); *Hills* v. *Eisenhart*, 256 F.2d 609, 610 (9th Cir. 1958), certiorari denied, 358 U.S. 832. It is also inapplicable where a party claims he need not exhaust the administrative remedy. *American Fed. of Gov. Emp. Local 1904, Local 1498* v. *Resor*, 442 F.2d 993, 995 (3d Cir. 1971). Nor should relief be granted in the face of a record establishing that plaintiff engaged in illegal conduct fully justifying termination. *United States* v. *Professional Air Traffic Controllers Organization*, 438 F.2d 79, 82 (2d Cir. 1970), certiorari denied, 402 U.S. 915.

Petitioner's contention that a remark by Senator Langer during debate was intended as a statement of the Back Pay Act's effect on the traditional jurisdiction of the federal courts and was effective to cause the Act, in the absence of explicit language therein, to limit that jurisdiction is frivolous. This Court has repeatedly refused to impute such an intention to Congress absent explicit statutory language. *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 609; *Scripps-Howard Radio Inc.* v. *FCC*, 316 U.S. 4, 11.

2. Petitioner characterizes this as "a routine probationary employee discharge case." It is hardly so. The government's refusal to produce its witness resulted in the

hearing's being adjourned in mid-hearing before the evidence as to Mrs. Murray's situation could be fully explored.[4]

The court of appeals clearly warned that the application of this principle is limited to the exceptional case. There is every reason to believe that this warning was heeded by the district courts. Of the 12 suits invoking the principle here cited by petitioner (Petitioner's Br., p. 11), 10 were dismissed out of hand. In *American Federation of Government Employees* v. *Fletcher*, D. D.C., No. C.A. 1238-72, a T.R.O. was granted, but later vacated and a preliminary injunction was denied, the district court holding

> "This is not the 'exceptional case' warranting issuance of a preliminary injunction, under the standard for interlocutory court intervention prescribed by the United States Court of Appeals for the District of Columbia Circuit in *Murray* v. *Kunzig*. . . ." *Id.*, *Findings of Fact and Conclusions of Law*, p. 7 (July 27, 1972).

Thus, of the 37,180 potential cases petitioner points to and 12 actual cases brought, there remains only one case in which relief was granted, *Kirk* v. *Kleindienst*, D.D.C., No. C.A. 1397-72. Whether plaintiff in that case met the test of exceptional circumstances is not yet known since the court of appeals has had no opportunity to pass on it.

Thus, the court of appeals should be affirmed.

3. This is not to deny the importance of the legal principle here involved. There are millions of civil servants.

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[4] The court of appeals made it clear that when the hearing reconvenes Judge Gasch should fully explore Mrs. Murray's claim of irreparable injury and, unless she can show exceptional circumstances, find for the government. However, should the Court desire to be informed as to the evidence Mrs. Murray will present, counsel could meet to agree on an appropriate method of presenting it.

Few if any of them will ever invoke the principle decided here, but that is not the point. Very few of us will ever have occasion to call on the courts to protect the right to speak freely on public matters or to petition the government, but it is important that the protection exist lest the freedom be lost. And the number of those having an indirect interest in establishing that, at least in the direst emergencies, this protection is available, is so great as to justify by itself consideration by this Court.

Moreover, as noted above, there has grown up a major body of law with respect to interlocutory relief pending an administrative determination. On only a few occasions has this Court been presented with an opportunity to delineate authoritatively the scope and limits of this important area of equitable jurisdiction.

Hence, respondent believes the importance of this issue in legal and human terms justifies granting the writ in this case.

CONCLUSION

The writ should be granted and the court of appeals affirmed.

Respectfully submitted,

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